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QUESTIONS PRESENTED

1. Whether there was basis in fact for petitioner's final classification as available for noncombatant military service.

2. Whether petitioner was denied procedural due process.

3. Whether witnesses who not only refused to be sworn but also refused to affirm under pain of perjury were properly denied the right to testify on behalf of the defense.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the

armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to par-

> ticipation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Seventh Circuit (Pet. 13a) affirming the two-year sentence imposed by the District Court for the Northern District of Illinois (R. 6–7) on petitioner's conviction for refusal to be inducted into the armed forces for noncombatant service (R. 6–7).

Petitioner's record with the Selective Service System (Gov. Ex. A) may be summarized as follows:

Petitioner registered under the selective service laws on April 7, 1950 (Gov. Ex. A, pp. 1, 4).

On March 22, 1951, he executed a questionnaire in which he gave his occupation as an employee of "Community Industries," a business organization run by his religious sect for the primary purpose of making tractors, and indicated that he made 75 cents per hour and worked a 40-hour week in this job (*Ibid.*, p. 7–A). He indicated that he was making a claim to conscientious objector status, and that he thought that his classification should be 4–E (the old designation for conscientious objectors) because of his religion (*Ibid.*, p. 9).

On April 6, 1951, petitioner's local board received from him the special form for conscientious objectors (*Ibid.*, pp. 11–12–A). In the space in which he was asked to describe the nature of his belief he wrote:

> God created the earth and brought man into the world to follow Him. He sent His only son into the world to die for us. To me it involves duties superior to those arising from any human relations.

He indicated that he received his religious training by going to church; that he relied on his minister, Leah Harshman, for religious guidance; that he did not believe "in force of any kind", and that he had given expression to his belief in his church. In the space in which he could indicate the actions and behavior in his life which most conspicuously demonstrated the consistency and depth of his religious convictions, he wrote,

"by denying myself of worldly pleasures". Petitioner stated that he belonged to the "Harshmanite" church, otherwise known as the Church of Christ, a communal religious sect centered in Sullivan, Illinois, which ran "Community Industries", the tractor factory which employed him. He indicated that the creed or official statement of his church is (*Ibid.*, p. 12):

> The Bible says that you shall love your emenies [sic] and to go to war with them is not showing love.

On April 19, 1951, petitioner was classified 1–A (available for full military service) by unanimous vote of his local board, and he was so notified on April 23, 1951. At his request he was granted a personal interview before his local board, and on November 5, 1951, he was notified that he had been granted a 1–O classification, i. e., exemption from combatant and noncombatant service (*Ibid*, p. 9–A).

Subsequently, the local board received from the State Appeal Board several other case files involving Harshmanites, who, though in almost the identical position as petitioner, had been classified 1–A by the appeal board (R. 88, 96, 129–130, 141–147). There was also transmitted a letter to the appeal board to which was attached a petition of 354 residents of Moultrie County, to the effect that they did not believe the Harshmanite young men were true conscientious objectors since their commercial enterprise, "Community Industries",

although regularly in the business of making candy, dresses, and garden tractors, worked on war contracts during World War II producing tents, tarpaulins, and ammunition boxes for the government, and during the then emergency had at least three government contracts (Def. Ex. 1).

At a meeting of the local board on December, 1951, the chairman informed the board of these communications and the board reconsidered the files of the remaining 1–O Harshmanites, including petitioner's. They decided to reclassify them 1–A (Gov. Ex. A, pp. 1, 9–A; R. 23, 96). On being so notified, petitioner requested and was granted another personal appearance before the board on January 4, 1952 (Gov. Ex. A, p. 9–A). On the basis of this new interview in which the new evidence was discussed, and on the basis of the appeal board action taken in the other Harshmanite cases, petitioner was retained in 1–A (Gov. Ex. A, p. 9–A; R. 93–94). A three-page statement was thereafter prepared by the local board and placed in petitioner's selective service file in order to record the basis of its action (Gov. Ex. A, pp. 18–20; R. 49, 85, 93).[1] In addition to setting forth the facts as to the prior action by the appeal board and the petition of the residents of the county, the local board noted that while the Harshmanites refuse military service

[1] The communication from the appeal board containing the petition of the residents of the county was placed in the local board's classified file (R. 31–32).

because they "cannot take orders from any persons except a member of their own sect" this position did not appear to be valid since they take orders in school, obey law enforcement agencies, and pay fines and taxes.

After noting an appeal petitioner addressed a letter to the appeal board (Gov. Ex. A, p. 22) in which he contended that one of the religious principles was "non-resistance", and "to be in Military Service and take up arms would be directly against the principles I have based my life on". He also filed extended statements written by his pastor, Leah L. Harshman, a daughter of the founder of the sect, in which she set forth the history of the Harshmanite faith and explained its tenets (Gov. Ex. A, pp. 23–42). She stated that members of the sect do not "accept or exercise any of the powers and privileges of citizenship", and refrain from joining organizations, because of the Biblical admonition (*Ibid.*, p. 25):

> Be not unequally yoked together with unbelievers.

This principal of "unequal yoking" forbids the young Harshmanites from joining the army on any basis (*Ibid.*, p. 26), since to do so "would be to put one's self voluntarily in the way of temptation" (*ibid.*, p. 31), and like any other "yoking together" with unbelievers, would be demoralizing as "evil communications corrupt good manners" (*Ibid.*, p. 38), and "any fleshly bond of union, however slight, will prove a snare to the church" (*Ibid.*, p. 39).

Miss Harshman explained the attitude of Harshmanites toward war as follows (*Ibid.*, p. 31):

> * * * we are not political pacifists. We do not feel that it is our mission to change existing governments. We do not try to abolish war. Christ said: "If my kingdom were of this world, then would my servants fight that I should not be delivered to the Jews, but now is my kingdom not from hence." Our warfare is a spiritual warfare to the end that the kingdom of Christ may be maintained on the earth. Governments as now constituted are maintained and administered by physical force. War is a necessary means of their existence and defence. This we recognize. We cannot participate in such governments nor take part in any way in the hatred and violence and slaughter which is war. We find it impossible to love our enemies and at the same time go about to kill them.
>
> * * * * *
>
> On the other hand we do owe the government any service it might demand that does not involve personal participation in the act of war. We are in fact willing to produce anything needed by the government when it is engaged in carrying on war. We do not feel that doing so makes us responsible for war or the waging of war. We would not willingly engage in the production of any article used directly

> to cause death. That would be repugnant to our principles and mission in this world.

On May 7, 1952, the appeal board made an initial determination that petitioner "should not be classified in either Class I–O [conscientious objector] or Class I–A–O [available for noncombatant military service]" (Gov. Ex. A, p. 9–A). Petitioner's file was transmitted to a Department of Justice hearing officer and a personal hearing was held on August 1, 1952. Although the hearing officer found petitioner to be sincere and recommended that he be classified I–O (*Ibid.*, p. 51), the Department of Justice recommended to the appeal board that he be classified I–A–O. The Department's letter states (*Ibid.*, p. 51):

> It is concluded, however, while registrant has sincere religious convictions against the actual taking of life and bearing arms, that his employment in a factory engaged in the manufacture of war goods is inconsistent with his claim to exemption from noncombatant service.[2]

The appeal board continued petitioner in class 1–A (*Ibid.*, p. 56), a classification which was continued after review by the State Director (*Ibid.*, p. 62–63, 66, R. 28). On July 1, 1953,

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[2] On April 9, 1953, petitioner wrote to the appeal board challenging the Department of Justice letter. He said (*Ibid.*, p. 55):

"We do not consider ourselves responsible for what is done with the finished products we manufacture since it is not directly involved in taking lives."

the National Director of Selective Service took an appeal to the President (*Ibid.*, p. 67), despite the unanimous vote of the appeal board.

Leah Harshman wrote a letter to the Presidential Appeal Board in which she reiterated that her sect was "forbidden to be yoked together with unbelievers in any sort of union on a common basis for a common purpose" (*Ibid.*, p. 60).

On September 9, 1953, the National Appeal Board classified petitioner I–A–O (available for noncombatant military service) by a 2 to 1 decision[3] (*Ibid.*, pp. 10, 69–70). Petitioner was thereafter ordered to report for induction on October 20, 1953 (*Ibid.*, pp. 10, 71). He reported but refused to submit to induction on October 21, 1953 (*Ibid.*, p. 72), stating that his position was (*Ibid.*, p. 73) "love your enemies and show love at all times."

ARGUMENT

1. Petitioner's final I–A–O classification by the Presidential Appeal Board rendered him liable to service with the military or naval forces in a *noncombatant* status only. Necessarily implied in this classification is a finding that he was conscientiously opposed, by virtue of his religious training and beliefs, to bearing arms or killing in armed combat. Petitioner contends, however (Pet. 20–21, 25–26) that the I–A–O classification

[3] The record does not disclose the position of the one dissenter.

did not comprehend the full scope of his religious scruples, and that on the basis of the evidence set forth in his selective service file it was incumbent on the Selective Service System to find he was also opposed to any participation in war including noncombatant service. His own assertions and those of his religious leaders do not, however, establish I–O (conscientious objector) status.

The I–O classification was obviously intended for those who on religious grounds have scruples, not only against bearing arms and killing, but also against the indirect support of the war effort involved in the life-saving duties required of I–A–O inductees. Such is not the nature of petitioner's objection to service. The real essence of petitioner's claim may be simply stated. He lives, works, and worships with a small insulated religious community which forbids close association or "yoking together" with "unbelievers". This is the basis of his refusal to belong to the army even in a noncombatant capacity. In other words, his objection to military service is not predicated on an objection to "participation in war" in the statutory sense, but is an objection to participation in any grouping which is not controlled by his own religious community. The objection he has to joining the army is precisely the same that he has to joining a fraternal lodge or a luncheon club. His "objections" are unrelated to the narrow purpose which Congress intended in exempting those who have a deep-

seated religious revulsion to helping the war effort even in an indirect way.

The record shows that petitioner had no scruples against working for "Community Industries" at a time when that communal tractor factory was working under three government contracts during the Korean War emergency.[4] His religious community had no compunction against acting as a war contractor for the government during World War II, and apparently was content to profit from the war situation as a direct supplier to the war effort. Such willingness to cooperate with the prosecution of the war is entirely inconsistent with conscientious objection to *noncombatant* "participation in war in any form". Petitioner, if inducted, would not be called upon to perform duties any more closely related to waging war than his civilian occupation. I–A–O inductees have almost uniformly been used for medical and hospital work[5]—duties

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[4] Petitioner consistently and erroneously attempts to minimize the proximity of his duties in "Community Industries" to the waging of war. The record is clear however that he was engaged in supply work under government contract for shipment to the armed services. His position was no less proximate to the fighting than many stateside troops of the supply services. (Gov't Ex. A, pp. 18–20, 50–51, 55, 60–61.)

[5] All I–A–O (available for noncombatant duty) registrants were, under the 1940 law, assigned to medical and hospital activities. Selective Service System Monograph No. 11, "Conscientious Objection", p. 332. We are informed by Army authorities that presently all I–A–O inductees are automatically assigned to the medical department by the

which involve saving life rather than taking it. While such persons wear a uniform they are regarded as non-belligerent by the nations of the world.[6] Nowhere in petitioner's selective service file, aside from statements of objection to association with non-believers, is there any statement which could be reasonably interpreted to forbid such life-saving activities.

This case is, therefore, basically very similar to that presented by many Jehovah's Witnesses cases, where the government contends that the objection to service is not fundamentally an objection to war but to submitting to governmental authority. In particular it is very close to *White* v. *United States*, 215 F. 2d 782 (C. A. 9), petition for certiorari pending, No. 390, this Term, where the Court of Appeals considered employment in an aircraft factory during the Korean emergency inconsistent with I–O status. While, as in White, the I–A–O classification distinguishes this case from the Jehovah's Witnesses cases presently before the Court for decision,[7] all of which

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Adjutant General's Department unless they request in writing a different assignment. See: Ex. Ord. 10028, 14 F. R. 211 (Pet. 8a).

[6] Pursuant to Articles 19–32 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (Dept. of State Pub. 3938, 1950), medical personnel are placed in a special non-belligerent category. They wear a brassard indicative of their position, they do not engage in combat, and they are given a special protected status both on the battlefield and in the event of capture.

[7] *Sicurella*, No. 250, *Witmer*, No. 164, *Gonzales*, No. 69,

involve I–A classifications, a decision by this Court on the relationship between religious objection to government authority and the statutory exemption may have some bearing on the issues presented by this case. We therefore suggest that it would be appropriate to defer action on this petition until the cases now before this Court are decided.

2. Petitioner also contends that he was denied procedural due process by the Selective Service System. The main thrust of his attack (Pet. 21–25) is against the local board proceedings which were superseded by *de novo* consideration of his entire case both by the appeal board and the National Board. The exhaustive review proceedings took into account not only the evidence before the local board, but extensive new evidence submitted by petitioner and the leader of his sect. Under such circumstances it was incumbent on the petitioner to show in the criminal proceeding that any procedural errors were not cured within the Selective Service System itself, and that such errors somehow infected the final classification which is the basis for the order to report for induction. *Bowles* v. *United States*, 319 U. S. 33, 35–36; *Reed* v. *United States*, 205 F. 2d 216 (C. A.

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and *Simmons*, No. 251. Both *Gonzales* and *Simmons* involve registrants who had engaged in employment directly related to the Korean War effort, and in each case such fact, in combination with other facts, was considered a basis for denial of I–O status. Gonzales worked in a steel plant, and Simmons worked as a civil employee at a naval station.

9), certiorari denied, 346 U. S. 908; *Davis* v. *United States,* 203 F. 2d 853 (C. A. 8), certiorari denied, 345 U. S. 996; *Tyrrell* v. *United States,* 200 F. 2d 8 (C. A. 9), certiorari denied, 345 U. S. 910; *Cramer* v. *France,* 148 F. 2d 801, 805 (C. A. 9). This he has not done, even assuming *arguendo* a sound basis for his assertions of error.

Petitioner contends for example that his local board erred in changing his I–O classification to I–A on the basis of the action by the state appeal board in similar Harshmanite cases (Pet. 26–29). This assumption that petitioner was reclassified only on the basis of what appeared in other files is, in the first place, in error, since his reclassification was reaffirmed on evidence received from him in a personal appearance after receipt and inspection of the other Harshmanite files (R. 93). In the second place, the validity of his I–A classification by the local board is under the cases cited above irrelevant to the consideration of whether his final I–A–O classification was arbitrarily rendered by the National Board. Moreover, selective service classifications can be changed at any time, and petitioner's local board was justified, in the interest of rendering equal treatment to all, in questioning its past action on the basis of new facts and the reasoning of the superior board and in calling petitioner in to reexamine his beliefs in the light of the new findings.

Petitioner also attacks the accuracy of a three-page summary of the oral and documentary evidence prepared by his local board and included in his file after his hearing (Gov. Ex. A, pp. 18–20). The summary states, *inter alia*, that "a further weight of evidence is that the board has, in its files, a petition, signed by three hundred and fifty-four (354) residents of Moultrie County who also do not believe the members of this faith are true conscientious objectors." Petitioner contends that this statement is an inaccurate recapitulation of what was said in the petition (Pet. 21–25). Reference to the original document and the letter of Donald J. Messmore to which it is attached, and which is therefore adopted by reference, show that this statement is a fair summary of those documents to which the townspeople recorded their approval (see Def. Ex. 1). The local board members testified on the trial that such was their understanding (R. 34, 49–50), and the trial judge apparently resolved the issue contrary to petitioner's present contention. In any event the issue of whether the 354 signators believed or disbelieved that petitioner was a true conscientious objector could have no bearing on his final I–A–O classification by the Presidential Appeal Board which recognized that petitioner was in fact sincerely opposed to combatant service.[8]

[8] We do not believe the cases cited by petitioner are apposite. Unlike the instant case they involve violations of

Finally, petitioner attacks the classification of the Presidential Appeal Board apparently on the ground that it rendered no written opinion setting forth its reasoning in classifying him (Pet. 6, 28–29). There is, however, no requirement for such an opinion. The task of the court on collateral review of selective service procedures is not to review administrative opinions but to search the selective service file for any basis in fact to support the final classification. *Cox* v. *United States*, 332 U. S. 442, 448–449; *Estep* v. *United States*, 327 U. S. 114, 122–123. This was the test employed in *United States* v. *Wilson*, 215 F. 2d 443 (C. A. 7), cited by petitioner, the court merely finding that there was no basis in fact for the final I–A classification. Nowhere in that opinion was it held that the Presidential Appeal Board must, in obedience to some uncited authority, render an opinion for the purpose of future judicial review. The only case support for such argument is dicta in *United States* v. *Hagaman*, 213 F. 2d 86, 89 (C. A. 3), where the court mentioned the lack of a written opinion as a "procedural deficiency". The court did not, however, reverse on that ground and admitted that such an opinion (*ibid.*, p. 89) "* * * is not necessary at all in the usual case where the issue in controversy and the basis of decision are made apparent

selective service regulations which the court in each case deemed to deprive the local board proceeding of essential fairness.

by the record itself." See dissenting opinion of Judge Goodrich (*ibid.*, p. 94): "We do not think that judges are authorized to impose such a requirement."

3. Finally, petitioner contends that the trial court erred in excluding him as a witness in his own behalf (R. 138–139) and also other witnesses (who did not even take the stand (R. 140)) on the refusal of each either to take the oath or to affirm that his testimony would be truthful (Pet. 29).

At common law, an oath was a requisite to competency as a witness. *Gillars* v. *United States*, 182 F. 2d 962, 969–970 (C. A. D. C.); *United States* v. *Miller*, 236 Fed. 798 (W. D. Wash.); VI Wigmore, *Evidence* (3d ed. 1940) Secs. 1813–1827. Although Rule 26 of the Federal Rules of Criminal Procedure, dealing with testimonial competency, adopts "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," that is now interpreted to allow for affirmation under pain of perjury in lieu of the oath. *Gillars* v. *United States, supra* (182 F. 2d at pp. 969–970); VI Wigmore, *supra*, Secs. 1827–1829. There is no authority for the proposition that "the principles of the common law" (Rule 26, F. R. Crim. P.) allow a witness to take the stand without affirming the truthfulness of his testimony and without placing himself under pain of perjury.

CONCLUSION

The decision below is correct on the facts and is not in conflict with any decisions of other courts of appeals. Inasmuch, however, as it involves issues the determination of which may be affected by this Court's decision in other cases now pending before it, it is suggested that it would be appropriate for the Court to defer action on this petition until the pending cases are decided.

Respectfully submitted.

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